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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-1286

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DOUGLAS E. MORIGEAU,
*Petitioner,*

v.

NOEL K. LARRIVEE,
*Respondent.*

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## RESPONDENT's BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent, NOEL K. LARRIVEE, respectfully submits the following brief in opposition to the Petition for Writ of Certiorari.

### OPINIONS BELOW

The opinion of the Supreme Court of Montana is accurately stated in Appendix A of the Petition and is not restated herein. The Order of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, is accurately stated in Appendix B of the Petition and is not restated herein.

### JURISDICTION

The Petition for Writ of Certiorari was timely filed and this Court has jurisdiction under 28 U.S.C. §1257 (3) (1976).

## QUESTION PRESENTED

It is the Respondent's position that the question for review as presented in the Petition is misleading and would restate the question presented as follows:

Whether a state district court has jurisdiction over a claim for relief brought by a non-Indian against an Indian for an automobile accident occurring on a state highway within the exterior boundaries of the Flathead Indian Reservation where the tribe ceded concurrent jurisdiction to the state in such area of law.

## STATUTES INVOLVED

The statutes cited in the Petition for Writ of Certiorari and appended thereto accurately reflect the relevant statutes for consideration of the issue here presented and are not restated.

## STATEMENT OF THE CASE

The facts as stated in the "Background" portion of the Petition for Writ of Certiorari are fairly stated. However, a careful reading of the Montana Supreme Court's opinion (App. A at 6a-18a, Petition) reflects the court's position that the state district court had *concurrent* jurisdiction in the matter with the Tribal Court (App. A at 16a, Petition) as a result of the Tribes' ceding of jurisdiction to the state in specific areas (App. G at 35a, Petition). It was the conclusion of the Montana Supreme Court that:

> "Nothing can be found within the tribal ordinance consenting to state jurisdiction or the Governor's proclamation assuming the same that limits or excludes State civil jurisdiction over the operation of motor vehicles on state highways."

App. A at 10a, Petition.

It should be further noted that the scope of the Montana Supreme Court's opinion was restricted to the Flathead Indian Reservation (App. A. at 18a, Petition) as it is the



only reservation in the state to grant such jurisdiction pursuant to Public Law 280, 67 Stat. 588, 18 U.S.C. §1162, 67 Stat. 589, 28 U.S.C. §1360 (1976) (App. C, Petition).

## ARGUMENT

### I. THE OPINION OF THE SUPREME COURT OF MONTANA COMPLETELY REBUTS THE REASONS PLEADED BY PETITIONER FOR SEEKING REVIEW.

The Petitioner sets forth four arguments as a basis for this Court to grant a writ of certiorari (See Index, Petition). All the reasons stated by Petitioner for review are addressed in the state supreme court's opinion (App. A, Petition) and are considered separately as follows:

1. *The decision of the Montana Supreme Court does not infringe on tribal sovereignty.*

In a detailed dissertation (App. A at 6a-12a, Petition), the state supreme court traced the history of Public Law 280 (App. C, Petition), the ceding of concurrent jurisdiction by the Tribes in certain areas (App. G, Petition) and the assumption of such jurisdiction by the state (App. E, Petition). Here, the Petitioner is not questioning the validity of assumption of jurisdiction pursuant to Public Law 280,[1] but rather the scope of the consent by the Tribes to the state. This argument is misplaced. The opinion by the Montana Supreme Court correctly focuses on the issue of whether the state can exercise *concurrent* jurisdiction with the Tribal Courts in eight general areas of the law. The Montana Supreme Court carefully considered, and rejected, those cases the Petitioner cited in support of his contention that the state could not exercise concurrent jurisdiction under the facts presented, stating:

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[1] *See Kennerly v. District Court of Montana,* 400 U.S. 423 (1979).

> "None of the cases cited by Morigeau and amicus in support of those points hold or require that *only* the tribal Court of the Flathead Indian Reservation, after the cession under Pub. L. 83-280, has exclusive jurisdiction of tort actions arising out of the use of the highways on the reservation. As a matter of fact, it appears that the Council of the Confederated Salish and Kootenai Tribes voluntarily found it in their interest to consent to such jurisdiction by the adoption of Tribal Ordinance 40-A (Revised)." (emphasis in original)

App. A at 13a, Petition. See also discussion App. A at 13a-14a, Petition.

The two principal cases cited by Petitioner in footnote 11 of the Petition [2] were presented to the state supreme court. Both of those cases are distinguishable from the instant case by one simple fact: Neither of the jurisdictions considering the question had assumed jurisdiction pursuant to a grant from the Tribes as reflected in Tribal Ordinance 40-A (Revised) (App. G, Petition). In each case cited in the footnote, the issue was whether the Tribal Courts had *exclusive* jurisdiction. Here, the question is whether the state district court could properly exercise *concurrent* jurisdiction. The Montana Supreme Court recognized the capacity of the Tribal Court to entertain actions by non-Indians against Indians, but concluded:

> "All of this material shows not that the Tribal Court is exercising *exclusive* jurisdiction, but rather is exercising *concurrent* jurisdiction in these matters insofar as they are covered by Tribal Ordinance 40-A (Revised). The Tribal Ordinance itself specifically speaks of concurrent jurisdiction and it is important to note that Tribal Ordinance 40-A (Revised) includes the provisions that any action commenced and completed either in the Tribal Court or in the state on a matter is

[2] *Enriquez v. Superior Court,* 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977), *Schantz v. White Lightning,* 231 N.W.2d 812 (N.D.1975).



> covered by the ordinance becomes res judicata as to the other court." (emphasis in original)

App. A at 16a, Petition.

2. *The state court's decision, if left to stand, will not "leave the tribes defenseless against unlimited state expansions of jurisdiction."*

The argument posed by counsel for Petitioner contending that the state will continue to expand its exercise of jurisdiction is pure speculation and conjecture. Counsel raises hypothetical questions that are not before this Court and are not subject to review.[3] The Petitioner suggests that the state supreme court has ignored or refused to recognize the right of tribal court jurisdiction in certain cases, which is obviously untrue.[4] There is nothing in the record to substantiate the Petitioner's allegations that the decision ". . . would leave the tribes virtually defenseless against unlimited state expansions of jurisdiction." (Petition at 8) Such rhetoric should not serve as grounds for granting certiorari.

3. *The decision will not discourage Indian tribes from consenting to state jurisdiction.*

Here, as in the preceding argument, counsel for Petitioner relies on unfounded speculation that tribes will be dissuaded from granting jurisdiction if the decision is allowed to stand. Petitioner ignores the fact that many benefits accrue to the tribes as a result of granting jurisdiction under Public Law 280, a fact recognized by the Montana Supreme Court:

> "There are many economic, financial and social advantages accruing to the tribes by virtue of their consent. Those advantages have accompanying responsi-

[3] *See e.g. Preiser v. Newkirk,* 422 U.S. 395, 403 (1975); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241 (1937.

[4] *See Security State Bank v. Pierre,* 162 Mont. 298, 305, 511 P. 2d 325, 329-30 (1973); *Blackwolf v. District Court,* 158 Mont. 523, 526-8, 498, P.2d 1293, 1294-5 K(1973); *Crow Tribe v. Deernose,* 158 Mont. 25, 28-30, 498 P.2d 1133, 1134-5 (1971).

bilities which, to make the system workable, must also be faced and accepted."

App. A at 14a, Petition.

Such benefits will continue to serve as an impetus to grant jurisdiction to the states as envisioned by Public Law 280.

4. *The state court's decision was based upon the plain meaning of the tribal ordinance.*

It is readily apparent from reading the first paragraph of the Statement of Facts in the Petition that this case involves an automobile accident occurring on a state highway within the exterior boundaries of the Flathead Indian Reservation. Petitioner has consistently recognized the fact that this case involves the "operation of motor vehicles upon the public . . . highways" as stated in Tribal Ordinance 40-A(h) (Revised). The language of the tribal ordinance is clear. It is also apparent that the drafters of the ordinance could discern the difference between civil and criminal jurisdiction and placed no limitation in the wording of that particular section of the ordinance dealing with operation of motor vehicles.[5]

Here, the effect of interpreting the ordinance as including tort actions is not to deprive the Tribal Court of jurisdiction in such cases,[6] but to simply recognize that the state courts have concurrent jurisdiction.

## II. THE LIMITED SCOPE OF THE STATE SUPREME COURT'S RULING SHOULD PRECLUDE FEDERAL COURT REVIEW.

The issue in the present case in uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

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[5]*Cf.* Tribal Ordinance 36-A(Revised) and 40-A(Revised) (App. G and H, Petition). The fact that Ordinance 36-A(Revised) dealt with highway safety and regulation presupposes that 40-A(h) (Revised) was intended to cover something else.

[6]See Appendix to Amicus Brief at A-V-1.



Rule 19 of the U.S. Supreme Court Rules[7] succinctly sets forth the criteria that the Court will apply in determining whether to grant a writ of certiorari. The cases interpreting this rule state that certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties[8] and imply a reach to a problem beyond the academic or the episodic.[9]

Here, the ruling of the state court is limited to the Flathead Indian Reservation (App. A at 18a, Petition). It does not apply to any other reservation in Montana and does not preclude bringing a tort action in Tribal Court. The limited scope of the decision should discourage Federal Court review in this instance.

## III. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

This case does not turn on any interpretation of federal law. Petitioner does not argue that the provisions of Public Law 280 were not met or that provisions of the Indian Civil Rights Act (App. D, Petition), have been violated. Rather, the issue presented here is whether a single clause in a tribal ordinance grants concurrent jurisdiction in tort actions arising out of the operation of motor vehicles on a state highway on an Indian Reservation. This Court has consistently declined to review matters where substantial federal questions were not at issue.[10]

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[7]Rule 19 states in relevant part: "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor.* (emphasis supplied)

[8]*NLRB v. Pittsburgh Steamship Co.,* 340 U.S. 498, 502 (1951).

[9]*Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1955).

[10]*Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945); *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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